77-636

Supreme Court, U. S.
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IN THE SUPREME COURT

OF THE UNITED STATES

Melvin L. Roberts, Appellant,

-vs-

Jesse C. Johnson,
Fire Marshal of
the State of
South Carolina, Appellee.

On appeal from the Supreme Court
of South Carolina

JURISDICTIONAL STATEMENT

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Appeal from the Supreme Court of South Carolina

JURISDICTIONAL STATEMENT

Appellant submits herewith his jurisdictional statement as required by Rule 15 of the Rules of the Supreme

TABLE OF CASES

Cohen v. California, 403 U.S. 15, 19 S. Ct. 1780 (1971), rehearing denied, 404 U.S. 876. (1972)	PP.4, 15
Ex Parte Williams, 277 U.S. 267, 48 S. Ct. 523 (1928)	PP.4, 16
People of the State of New York v. Zimmerman 278, U.S. 63, 49 S. Ct. 61 (1928)	PP.5, 18

GROUNDS OF JURISDICTION

Melvin L. Roberts appeals to the Supreme Court of the United States from Opinion No. 20460 of the South Carolina Supreme Court filed June 29, 1977, Rehearing denied August 5, 1977. Notice of Appeal was filed August 9, 1977 in the Supreme Court of South Carolina.

This is an action by the State Fire Marshal to close Appellant's self-service gasoline stations until and unless he has "qualified attendants" on duty when they are open to the public. Appellant's position is that the Fire Marshal's Regulations requiring attendants are an unreasonable exercise of the police powers in violation of the State and Federal Constitutions because no dangerous situation exists. This is shown by the absence of any evidence of any fire due

to the self-service feature at any self-service gasoline station anywhere in the world, although such stations have been in existence elsewhere for more than thirty-five (35) years and for more than five (5) years in South Carolina. There are now several hundred of them in South Carolina and scores of similarly situated businessmen may be deprived of their substantial investments by the ruling of the court below.

This appeal is taken pursuant to 28 U.S.C. 1257 (2).

Jurisdiction is sustained by the following cases:

Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780 (1971), rehearing denied, 404 U.S. 876, 92 S. Ct. 26 (1972);

Ex Parte Williams, 277 U.S. 267, 48 S. Ct. 523 (1928);

People of the State of New York v. Zimmerman, 278 U.S. 63 49 S. Ct. 61 (1928).

The Petitioner challenges the effect upon his constitutional rights of Sections 16.74 and 16.75 of the South Carolina Fire Prevention Code, which the South Carolina Supreme Court held to have the force and effect of law in this case. The pertinent sections provide:

> Section 16.74. Attendence or Supervision of Dispensing. Each service station open to the public shall have an attendant or supervisor on duty whenever the station is open for business.
>
> Section 16.75. Dispensing Systems.
>
> ....
>
> f. Special Type Dispensers
>
> (1) Approved special dispensing devices such as, but not limited to, coin-operated, card-operated, and remote preset types are permitted at service stations, provided there is at least one

> qualified attendant on duty while the station is open to the public. The attendant's primary function shall be to supervise, observe and control the dispensing of Class I liquids while said liquids are being dispensed. It shall be the responsibility of the attendant to prevent the dispensing of Class I liquids into portable containers not in compliance with 16.73 (e), control sources of ignition, and to immediately handle accidental spills and fire extinguishers, if needed.
>
> ....

QUESTIONS PRESENTED

1. Is the enforced closing of Appellant's self-service gasoline stations a reasonable exercise of police powers where there was no evidence introduced to show a single fire due to the self-service feature at any gasoline station at any time anywhere in the world, although self-service gasoline stations have been in existence for over thirty-five (35) years in the United States and for over five (5) years in the State of South Carolina and where there had been no showing of any reasonable relationship between the deprivation of appellant's rights and any actual and manifest evil?

2. Was Petitioner denied the Constitutional guarantees of due process and equal protection of the laws under

the fifth amendment and section one of the fourteenth amendment of the United States Constitution when his operation was singled out for enforcement of Section 16.74 and 16.75 (f) (1) of the Fire Prevention Code while other installations using keys or cards to activate the pumps in the absence of attendants (key lock and card operations), and Mom and Pop Country Store' operations and convenience stores (where the customer, without an attendant at the pump, pumps his own gasoline) were all permitted to operate as usual without any action being undertaken or contemplated against them?

3. Did the Occupational Safety and Health Act of 1970 (29 U.S.C. 655) pre-empt Sections 16.74 and 16.75 (f) (1) of the Fire Prevention Code by virtue of the Supremacy Clause of the

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United States Constitution when OSHA rulings have established jurisdiction of self-service, unattended stations, while also specifically ruling that attendants are unnecessary for safety?

STATEMENT OF THE CASE

The appellant is the owner of a group of self-service gasoline stations. The South Carolina State Fire Marshal brought an action to enjoin appellant from operating these stations unless a qualified attendant was present, as required by sections 16.74 and 16.75 (f) (1) of the Regulations promulgated by the State Fire Marshal. The appellant argued in the South Carolina Court of Common Pleas that enforcement of this regulation was invalid for multiple reasons:

1. The Fire Marshal's attempt to close appellant's self-service gasoline stations is an unreasonable exercise of the State's Police Powers.

2. The Fire Marshal, in promulgating the regulations, was acting beyond

the scope of his authority and the regulations were unconstitutional since they deprived appellant of his property without due process of law and denied appellant the equal protection of the laws as provided in the fifth amendment and section one of the fourteenth amendment of the United States Constitution.

3. The appellant was denied the Constitutional guarantees of due process and equal protection of the laws under the fifth and fourteenth amendments of the United States Constitution by discriminatory enforcement of sections 16.74 and 16.75 (f) (1) of the Fire Marshal's Regulations, while other legally similar operations were all permitted to operate as usual without enforcement being undertaken against them.

4. The Occupational Safety and Health Act of 1970 (29 U.S.C. 655) in authorizing unattended self-service gasoline stations, pre-empted the conflicting position of sections 16.74 and 16.75 (f) (1) of the Fire Marshal's Regulations by virtue of the Supremacy Clause of the United States Constitution.

5. The term 'qualified attendant' as used in the Regulation is unconstitutionally vague, indefinite and uncertain.

The trial court sustained appellant's position in every respect.

Upon the Fire Marshal's appeal, these same issues were also presented to the South Carolina Supreme Court. However, that court reversed the trial court, dealing mainly with the State question of whether the promulgation of regulations by the State Fire Marshal

was an unlawful exercise of legislative authority. The Court further held that the term 'qualified attendant' as used in the Regulation, was not vague and indefinite and that there was no discriminatory enforcement as to deny appellant equal protection or due process of law. The South Carolina Supreme Court further held that there was no question of Federal pre-emption of the regulation involved in the case. Other questions presented to it were inferentially decided against appellant. A petition for rehearing was filed and denied.

In the courts below, the appellant raised the issue of whether the promulgation of sections 16.74 and 16.75 (f) (1) of the Fire Marshal's Regulations constituted the invalid and unlawful use of the State's Police Power. The South Carolina

Supreme Court did not directly rule on this issue.

Appellant also raised the question of whether 29 U.S.C.A. 655 and the Regulations promulgated thereunder pre-empted sections 16.74 and 16.75 (f) (1) of the Fire Marshal's Regulations. The South Carolina Supreme Court ruled as follows: "There is, therefore, no Federal law dealing with the requirement of an attendant at a self-service gasoline station and consequently, no question of Federal pre-emption of the regulation involved in this case." Opinion No. 20460, p. 17.

FEDERAL QUESTIONS ARE SUBSTANTIAL

Title 28, U.S.C. 1257 (1977), provides, in pertinent part:

> State courts; appeal; certiorari
>
> Final judgments or decrees rendered by the highest court of the State in which a decision could be had, may be reviewed by the Supreme Court, as follows
>
> ....
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

In Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780 (1971), rehearing denied, 404 U.S. 876 92 S. Ct. 26 (1971), this Court held that, when a contention that a state statute violates the Constitution has been rejected by the highest state court in which review can be had, the Supreme Court has jurisdiction to hear the case. In the present case, the

appellant's Constitutional objections have been rejected by the South Carolina Supreme Court, therefore, 28 U.S.C 1257 is controlling and this Court has jurisdiction.

It should be noted further that 1257 (2) also applies to decisions involving the validity of administrative regulations. In Ex Parte Williams, 277 U.S. 207, 272 (1928), this court held that"...judgment of a state court sustaining the validity of a regulatory order of a public utilities board is reviewable by writ of error, like a judgment sustaining the validity of a statute."

That rule regarding "adequate and independent state grounds" is not applicable here. The rule is applicable only where the situation is such that the state grounds are sufficient to

sustain the judgment regardless of the determination of the Federal questions.

Here, resolution of the Federal questions favorably to Appellant will invalidate the regulation and determine this appeal. The authority of the Fire Marshal to make regulations is immaterial when the question is whether or not the regulations are reasonable and permissible under the United States Constitution. Therefore, there are no adequate and independent state grounds which will bar the appeal to the United States Supreme Court.

Although the South Carolina Supreme Court did not directly decide all of the Constitutional questions, the important point is that they were presented to that court. They were, therefore, inferentially decided adversely to

appellant by the reversal of the trial court. In the case of People of the State of New York v. Zimmerman, 278 U.S. 63 (1928), this Court held that if the Constitutional question is brought to the attention of the state court with "fair precision" and "in due time", the claim is to be regarded as having been adequately presented. The Court further held that:

> ...the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough.

In other words, presentation of the issue is sufficient. In the present case, appellant consistently presented his Constitutional claims to the state courts in which the action was heard. These claims were decided in

favor of appellant by the trial court. The South Carolina Supreme Court, by its reversal, either expressly or impliedly upheld the constitutionality of the contested regulations. Since the Petition for Rehearing was denied, there is no other forum available.

CONCLUSION

Appellant submits that this appeal brings before the Court substantial federal questions which require plenary consideration, with briefs and oral argument on the merits required for their resolution.

CERTIFICATE OF PROOF OF SERVICE

I, LEE S. ALFORD, Attorney for Appellant, MELVIN L. ROBERTS, hereby certify that a copy of the foregoing Jurisdictional Statement has been deposited in the United States Mail, First Class, postage prepaid, properly addressed, to Appellee's Counsel, THE ATTORNEY GENERAL OF SOUTH CAROLINA, Post Office Box 11549, Columbia, South Carolina 29211, on this the 28th day of October, 1977.

Lee S. Alford
LEE S. ALFORD

APPENDIX 'A'

STATE OF SOUTH CAROLINA	)	IN THE COURT
	)	OF
COUNTY OF YORK	)	COMMON PLEAS
Jesse C. Johnson, Fire Marshal of the State of South Carolina,	)	
Petitioner,	)	
-vs-	)	ORDER
Melvin L. Roberts,	)	
Respondent.	)	

This matter comes before me upon a Rule To Show Cause issued by the Honorable William Rhodes, Presiding Judge, Sixteenth Judicial Circuit, dated February 8, 1973, accompanied by the Petition of the Fire Marshal of the State of South Carolina requesting the Rule and an injunction requiring the respondent to cease operating self-service filling stations which he may

have operating without a qualified attendant on duty. Thereafter, the respondent filed his Answer setting forth in detail the reasons for his position that no valid law exists justifying the issuance of the injunction.

The matter came on for a hearing before the undersigned at the York County Courthouse on January 12 and 13, 1976. The petitioner was represented by Ronald H. Colvin, Esquire, and Edward B. Latimer, Esquire, both of the office of the Attorney General for South Carolina, and the respondent was represented by Robert R. Carpenter, Esquire, of Roddey, Sumwalt & Carpenter, and Emil W. Wald, Esquire, of Spencer and Spencer, P. A., both of the Rock Hill Bar, and Lee S. Alford, Esquire, of the York Bar.

The Petition of the Fire Marshal

asserted that the Fire Marshal, acting pursuant to his authority, had promulgated the 1970 Edition of the Fire Prevention Code, which code required that at least one qualified attendant be on duty during the dispensing of class one liquids (including gasoline) and that the Fire Prevention Code was never properly adopted into the Rules and Regulations of this State; that the applicable statute was not followed in that minimum and nationally recognized standards do not require such attendants; that such regulation was an excessive use of Police Power since no evil existed requiring correction; that the application of the regulation by the Fire Marshal is contradictory and discriminatory in its application requiring the respondent to furnish an attendant when no effective

attendant is present at convenience stores and other similar establishments dispensing gasoline; that the lack of enforcement by the Fire Marshal against key-lock and card operated dispensing stations without the presence of an attendant constituted unconstitutional discrimination against the respondent, that the term qualified attendant is vague, uncertain and indefinite, rendering the regulation void and of no effect; that the Fire Marshal acted discriminatorily against this respondent in taking legal action against him and not against numerous other operators of unattended gasoline dispensing stations; that the application of the regulation is an illegal attempt by the South Carolina Oil Jobbers Association to control prices to the detriment of the public; that the regula-

tion is violative of the equal protection of the laws guaranteed to the respondent by the South Carolina and the United States Constitutions in that it is an unreasonable limitation of his property rights without rational basis for the requirement; that Title 37-32.2 of the South Carolina Code does not authorize the action, and that the promulgation of detailed rules and regulations without appropriate legislative direction constituted unlawful and unconstitutional delegation and exercise of legislative authority by a member of the executive branch.

The hearing took place over a two-day period and the parties presented witnesses, documentary and demonstrative evidence in support of their respective positions. Thereafter, written Briefs

were submitted by the petitioner and the respondent.

A short factual summary is appropriate. The respondent, Melvin L. Roberts, decided in the year 1971 to enter the self-service gasoline business at a time near the beginning of a boom in that business which has not yet peaked. Being a competent attorney, the respondent quite naturally attempted to comply with all state and federal laws and regulations as well as local ordinances. In addition to applicable laws and ordinances, he found that the South Carolina Department of Agriculture had published and indexed under "gasoline", regulations entitled "South Carolina Petroleum Products Generally, Rules and Regulations." No other governmental agency regulations were so indexed, then

or now. Thereafter, the respondent complied with all discoverable rules from every source and made substantial investment in the self-service gasoline business.

After about a year's time, the South Caroline Fire Marshal's Office notified the respondent that his operation was in violation of the 1970 edition of the Fire Prevention Code, a publication of the American Insurance Association, which had been issued by the Fire Marshal as a "Regulation" by filing it with the Secretary of State on December 14, 1970.

Specifically that "Code" provided that a gasoline dispensing station, open to the public, must be manned by a "qualified attendant" during the hours it is open to the public.

The respondent, Roberts, aware of the

activity of some portions of the oil industry in direct competiton with his type operation, has maintained the invalidity of the "Regulation" or its application and has resisted its application to his operation, culminating in the hearing before the undersigned.

After having had the opportunity to hear the sworn testimony and to observe the credibility of the various witnesses, and after examining in detail the evidence constituting the record and after considering the arguments of counsel, I have reached the following findings of fact:

I find as a fact that the parties are properly before the court, that the court has jurisdiction of the subject matter and that all parties are subject to the jurisdiction of the court.

I find as a fact that the 1970 Fire

Prevention Code was filed by the Fire Marshal with the Secretary of State and that a provision of that code requires the presence of a "qualified attendant" whose primary function shall be to supervise, observe and control the dispensing of class one liquids while those liquids are being dispensed.

I further find as a fact that the respondent is operating currency operated self-service gasoline dispensing stations without the presence of an employed attendant.

I further find as a fact that prior to the adoption and purported promulgation by the Fire Marshal of the Fire Prevention Code, no public notice calling for hearings or otherwise called attention to the fact that the proposed code included a requirement for attendants at

self-service gasoline stations.

I further find as a fact that prior to the adoption of the Fire Prevention Code by the Fire Marshal, no study was instituted by the Fire Marshal or anyone in his behalf to determine whether any requirement of attendants at self-service gasoline dispensing stations was necessary for the protection of public health, safety and welfare.

I further find as a fact that gasoline dispensing stations in South Carolina are regulated by the South Carolina Department of Agriculture and that no reference in the South Carolina Code, or the index thereto, direct attention to Title 37 or the Fire Prevention Code as published in the Rules and Regulations Volume, that the respondent complied with the applicable regulations issued

by the Agriculture Department and had no notice of the requirement of an attendant at a self-service gasoline dispensing station at the time such station was constructed.

I further find as a fact that the petitioner has demonstrated no need for the requirement of attendants and, to the contrary, the clear evidence is to the effect self-service currency operated gasoline dispensing stations are as safe or safer than conventional, attended gasoline service stations due to the unique characteristics of the new currency operated and automated self-service installations.

I further find as a fact that the only study of the need for a requirement for attendants made in this State was carried out by a subcommittee of the

Fire Marshal's Advisory Committee, which recommended to the full Advisory Committee the deletion of the requirement for attendants and that thereafter the Fire Marshal's Advisory Committee adopted the subcommittee report and voted to recommend deletion of the requirement for attendants to the Fire Marshal.

I further find as a fact that the Occupational Safety and Health Administration of the Federal Government, which has jurisdiction of unattended self-service gasoline stations (See Federal Register, Volume 37, No. 215, page 23646), deleted its previous requirement for attendants at self-service gasoline dispensing stations after finding lack of a significant hazard. (Federal Register, Volume 39, No. 52, page 9957, et seq.)

I further find as a fact that self-

service unattended gasoline dispensing stations open to the public, such as those of the respondent, are proliferating across this country and legally exist in other States, including an abundance of such stations in our sister state of North Carolina.

I further find as a fact that self-service gasoline dispensing stations not only constitute a great convenience for the motoring public, but in some instances are a necessity by virtue of their making gasoline available on a 24-hour basis, that gasoline is not otherwise available on a 24-hour basis where respondent operates; and further, that the public derives benefits from a significant direct savings in the cost of gasoline amounting to several cents per gallon and an indirect savings by virtue of the

competitive effect on pricing of gasoline dispensed from conventional and other type stations.

I further find as a fact that after studying the relative risks involved, insurance underwriters in both North and South Carolina presently issue liability insurance coverage for all types of service station operations including unattended self-service operations at the same rate; and I further find that unattended self-service gasoline stations are as safe or safer than conventional gasoline dispensing stations.

I further find that the term "qualified attendant" as used in the specified portion of the Fire Prevention Code is vague, uncertain and indefinite and that the entire Code provision does not provide for definition of the term; and further

that as the term is applied by the Fire Marshal, it is rendered meaningless.

I further find that the Fire Prevention Code is not a code providing "minimum" standards of fire prevention as required by Section 37-82.1, but provides standards for "good practice". (See Section 1.1 of the Fire Prevention Code)

I find as a fact that the attempted promulgation by the Fire Marshal of the Fire Prevention Code constitutes "legislation" by a member of the Executive Branch; and further, that the petitioner believes that it is his responsibility as State Fire Marshal to "legislate safety standards". (See Petitioner's Reply Brief, Item 30)

I further find as a fact that the Fire Marshal has not instituted this action

pursuant to a defect in a building and that this action does not involve any defect in any building or structure within the meaning of Section 37-82.2 of the South Carolina Code.

Based upon the above findings of fact and after having given due deliberation to the authorities cited by the respective parties, I have reached the following conclusions of law:

The application of the Police Power of the State is so vast and so powerful as to require careful and conscientious limitation of that power. The right of the individual who is the subject of the exercise of this power can be subordinated to the public benefit only in situations narrowly defined by the Constitution. An essential element requisite to the invocation of the Police Power is the

benefit resulting to the public as to its health, safety and general welfare. It is abundantly clear in the instant case that the exercise of Police Power asserted by the petitioner goes far beyond the constitutional bounds permitted.

In addition to the requirement for benefit to the public, a constitutionally proper exercise of Police Power must be reasonably related to, as well as applied to, some actual and manifest evil and the means adopted must be reasonably appropriate to the end sought to be accomplished.

Several preliminary observations are in order before reaching the constitutional issues raised.

The Fire Prevention Code

The 1970 edition of the Fire Prevention Code was published by the American Insurance Association. It is intended

to form a guide to a municipality wishing to adopt such a code by ordinance and includes a draft Ordinance for the use of City Councils. (See, e. g., Fire Prevention Code (hereinafter cited as FPC) 1.13 and Appendix D, page 244). The Code booklet consists of some 273 pages.

The Fire Prevention Code covers a wide ranging field of subjects such as fireworks, lumber yards, bowling alleys and feed mills, for example. Much of its far-ranging coverage overlaps or contradicts existing state and federal statutes and local ordinances. (Of course, the adopting resolution of the Fire Marshal notes that in the event of conflict with any statute or local ordinance, the Fire Prevention Code is not controlling). It is clear that no effort was made to reconcile the document with existing law nor,

indeed was any real study of its need or its provisions ever made. The Fire Marshal, quite honestly, asked, "Who am I" to question the decisions of the insurance experts in drafting the Fire Prevention Code provisions? Thus, in reliance on Section 37-82.1 of the South Carolina Code (1962, as amended), he merely incorporated this large document, designed only as a guide for municipalities, by reference, into the legal status of a Regulation after only the most perfunctory hearings. Not a single amendment was made by the Fire Marshal. This is the document which the Fire Marshal relies upon as justification for his exercise of the vast resources of this State's Police Power.

OSHA

The Occupational Safety and Health Act of 1970 (29 U.S.C 655) provides for

an Occupational Safety and Health Administration under the Department of Labor to implement the law. The law was enacted to insure the safe and healthful working conditions of the American work force. To achieve this express purpose, Congress established a regulatory scheme applicable to employees and businesses affecting interstate commerce. The Secretary of Labor is empowered to administer an enforcement procedure under the Act which includes civil and criminal penalties and injunctive proceedings.

In the event a State desires to enact legislation within the scope of OSHA, Section 667 of the Act provides the machinery whereby a detailed and comprehensive plan is prepared by the State and submitted to the Secretary of Labor for prior approval.

The Secretary of Labor heretofore established standards at 29 Code of Federal Regulations 1910.106 concerning flammables, which were based on NFPA No. 30. (See Petitioner's Exhibit #9) These standards originally required the presence of an attendant at self-service gasoline stations for the safety of employees who are, from time to time, present. (See Federal Register, Vol. 37, Number 215, page 23646, paragraph 1 for a rationale for jurisdiction in this area. Respondents Exhibit #16.)

In Munford, Inc., et al., vs. Georgia Oilmen's Association, et al., (Mid. Dist. Ga, C.A.-2655, Filed January 12, 1973) a three-judge federal panel ruled on a Georgia statute requiring, inter alia, the presence of an attendant at the location of the pump at self-service stations.

Section 1 of the Georgia Act (known as the House Bill 1013) provided for licensing of all service stations at the local level. Section 2 provided:

> Section 2. It shall be unlawful for any person, firm or corporation to operate a self-service motor fuel dispensing pump unless an attendant is present at the pump's location, and such person, firm or corporation shall have obtained a valid license from the governing authority of the political jurisdiction affected. Any person, firm or corporation violating any provision of this Act shall be guilty of a misdeameanor and punished accordingly.

As to whether the Georgia law quoted above was pre-empted by OSHA under the Supremacy Clause, the court held:

> Plaintiff's attack on Section 2 of the Statute proceeds on the same arguments used to challenge Section 1...Unlike the latter provisions, however, Section 2 commands the implementation of a specific standard, stating that, "It shall be unlawful for any person, firm or corporation to operate a self-service motor fuel dispensing pump unless an attendant is present at the pump's location..."

> We find that this portion of the section is inconsistent with the acknowledged purpose of the Federal Act to provide a comprehensive system of occupational health and Safety regulations. See, e. g, Campbell v. Hussey, supra; Northern States Power Co. v. Minnesota, supra. This regulation is not a general exercise of police power which passes on the existence of the activity. Rather, it is a narrowly drawn standard of the type promulgated by the Secretary which may be validly enforced by the State only if it is part of a State plan submitted and approved under 667 of the Act. Because the purpose of the Act would be frustrated by the paralled enforcement of Section 2, the fact that it was passed to protect the public, not employees, will not prevent its federal preemption. Perez v. Campbell, supra. (Munford, Inc., et al. v. Georgia Oilmen's Association, et al., supra, at 28-9)

The defendants in Munford argued that federal preemption should be applied only when the standards are inconsistent and that the Georgia Act was consistent with the OSHA standard in effect in 1973. The panel reject that argument saying:

> The requirement of an attendant at

> the dispensing pump's location is a standard within the meaning of the Act and it seeks to govern a subject specifically covered in 1910.106(g)(3)(vii)(a) of the regulations. The fact that is may be consistent with the provisions of the regulation is irrelevant to the question of its pre-emption by the Act.... Therefore, that part of Section 2 of the statute which requires an attendant to be "present at the pump's location" is unenforceable and of no effect as violative of the Supremacy Clause. (Munford v. Georgia Oilmen's Association, supra, at 29-30)

There can be little doubt that a federal panel would conclude that the pertinent sections of the Fire Prevention Code would likewise fall to the doctrine of federal pre-emption under the Supremacy Clause.

It should be noted, however, that OSHA has revised its position on the requirement of an attendant at self-service stations since the Munford case was decided. On March 15, 1974, the Secre-

tary of Labor deleted the requirement of an attendant while retaining for self-service stations other applicable standards as to nozzles and other equipment. (Federal Register, Vol. 3a, No. 52, page 9958, Respondent's Exhibit #17) After hearing from all concerned, the Secretary ruled that "it has been determined that... (an attendant or in the alternative additional safety rules) are not necessary nor appropriate to the safety of...employees' who may be present in self-service stations, and as a result "revoked' the requirement for an attendant. (Id.,at 9958, 8)

It is clear that, absent compliance with Section 667 of the Act by this State, the attempted regulation by the Fire Marshal of attendants at self-service gasoline stations conflicts with the

present OSHA standard and so must fail because of federal pre-emption by virtue of the Supremacy Clause of the United States Constitution.

The Fire Marshal should not complain, in any event, however. Not only does the Fire Prevention Code defer to the superiority of any conflicting "statute", "ordinance", or "building code", (See Resolution of Fire Marshal, December 14, 1970, Petitioner's Exhibit #1) but, by its own terms, compliance with any national standard constitutes compliance with the Fire Prevention Code.

> It is the intent of this code to prescribe regulations consistent with nationally recognized <u>good</u> practice for safeguarding to a reasonable degree of life and property from the hazards of fire and explosion arising from the storage, handling and use of hazardous substances, materials and devices, and from conditions hazardous to life or property in the use or occupancy of buildings or premises.

> Compliance with standards of the American Insurance Association or the National Fire Protection Association <u>or other approved nationally recognized safety standards</u> shall be deemed to be prima facie evidence of compliance with this intent. (F.P.C. 1.1) (Emphasis added)

It is clear to the writer, and I so hold, that the respondent is in compliance with the Occupational Safety and Health Administration standard, that such constitutes "nationally recognized safety standards", and that the respondent is, therefore, in compliance with stated intent of the Fire Prevention Code.

Though it is the opinion of the writer that the relief sought by the Petitioner be denied because 1) the respondent is in compliance with the stated intent of the Fire Prevention Code and 2) the authority of the Fire Marshal has been pre-empted by the Federal

Government in jurisdiction of this area, nevertheless, complete rulings on all issues raised should be helpful, especially since the Fire Marshal has announced, in advance, his intention to appeal an unfavorable ruling.

Lawfulness of Police Power Exercise

Perhaps one of the more difficult areas of adjudication involves weighting the exercise of the vast police power of the state for the benefit, safety, health and welfare of the general public as against the civil rights of an individual citizen denied one or more of those rights by the exercise.

Due process of law requires, for a valid exercise of police power, that the legislative exactment be reasonably related and applied to some actual and manifest evil and that the means adopted

must be reasonably appropriate to the end sought to be accomplished. (See, e.g., Cowan vs. City of Buffalo, 247 App. Div. 591; Oil City Center vs. City of Yonkers, 53 Misc. 2d 191)

The Fire Prevention Code has never been considered by the South Carolina General Assembly, but only by a member of the Executive Branch of the government. Thus, the Fire Prevention Code, and in particular the portion asserted in this proceeding, is not entitled to the presumption of validity usually accorded legislative enactments.

The respondent has challenged the existence of an actual and manifest evil necessitating any corrective action at all. The record is clear and convincing on that point. The office of the Fire Marshal made no particular study or

investigation into the need or necessity i. e., the evil to be corrected. In fact, the Fire Marshal asks rhetorically, "...(W)ho am I as the Fire Marshal of South Carolina to question the nationally recognized standards dealing with petroleum products...?" (Minutes, October 16, 1975, Fire Marshal Advisory Committee, Respondent's Exhibit #2)

In Beard vs. Bolton, 107 Ga. App. 863, 131 S.E.2d 835, an ordinance required coin operated, self-service laundrys to close during certain night-time hours unless an attendant on duty was provided. The court viewed the question as:

> ...(Whether...that part of the ordinance which requires a self-service (coin operated) laundry to close between the hours of eleven p.m., and seven a.m., unless it has an attendant on duty during such hours is unreasonable arbitrary, and oppressive, and bears no relation to the good order, peace and safety and health of the community.

(Id. 131 S.E.2d 835, 836)

The appellate court reversed the trial court, holding:

> The business operated by the defendant being a legitimate, useful and lawful one and, in view of the tendancy of modern business to rely more and more on automation in order to provide better services to the public at a lesser cost, the ordinance in question was unreasonable and void. (Id., 131 S.E.2d 835, 837)

The Court reasoned that the requirement of an attendant was tantamount to requiring the self-service laundry to close during those hours, depriving the public of both the monetary as well as the all hours benefit. The Fire Marshal had views similar to the municipality in the Heard case. The Fire Marshal has said of self-service gasoline stations:

> I cannot see justification in leaving a filling station open just to accomodate somebody at 2 or 3 o'clock in the morning. (Minutes, October 16, 1975, Fire Marshal

Advisory Committee, Respondent's Exhibit #2)

In Heard, the municipality attempted to justify its conduct with a law enforcement argument similar to the Fire Marshal who suggests that an attendant would protect against drunks and vandals and other law violators. But, in disposing of that argument, the court said:

> The evidence adduced showed that perhaps it might be more difficult to properly police the city if unattended places of business remain open after dark, but is this reason enough to close down a lawful business? As was said in City of Jackson v. Murray-Reed-Slone & Co., 297 Ky. 1, 178 S. W. 2d 847: "The fact that the city may have to go to more expense in policing the town at night should businesses be transacted at late hours is no reason for sustaining the ordinance. It might as well be said that an ordinance closing a respectable mercantile establishment during the afternoon hours would be constitutional because such a business attracts crowds to the town which require more policemen to handle when such a house is operated than when it is closed." See also Town of McCool v. Blaine, 194 Miss. 221,11 So. 2d 801.

(Heard v. Bolton, 107 Ga. App. 863, 131 S. E. 2d 835, 837 (1963)

One judge in Heard concurred specially adding that this case was distinguished from similar cases where, prior to enactment, specific findings of manifest evils were made. He noted that in about five years operation of five locations, the defendant's operation had only four (4) Fire Department calls and twelve (12) reported larcenies. He concluded that such was totally insufficient to require the presence of an attendant or, in the alternative, closing during the required hours. (Id., 131 S.E. 2d 835, 838)

By comparison to the instant case, the Fire Marshal testified that he had no information at all concerning a fire at any self-service gasoline stations anywhere in the world. One of his witnesses testified to the infrequent use of improper containers as

gasoline receptacles, but admitted that his observations had been made at attended stations. Another witness for the petitioner, having national statistics available to him, testified that he had heard of only two very small fires. It was uncontradicted that no no fires have ever been attributed to the self-service feature, anywhere in the country, though such stations are in wide use. Bearing out this evidence was the further uncontradicted fact that unattended self-service stations are insured at exactly the same rates as are conventional, attended stations.

The evidence is overwhelming that there is no demonstrated need consisting of an actual and manifest evil justifying the injunctive relief sought by the petitioner.

Further, the requirement of an employed attendant is an unreasonable burden not justified by intended benefit of the public health, safety and welfare.

The requirement of a paid attendant was ruled to be an unreasonable exercise of the states police power in the case of Friendlyville Enterprises, Inc., vs. Village of Amityville, 217 N.Y.S. 2d 695 (1961). Friendlyville also involved a coin operated laundry. An ordinance required the full time attendant because such machines "are potentially dangerous and particularly so when exposed to the unsupervised use of the public." (Id., at 697) The court noted:

> ...to mandate that an attendant be present at all times would remove from the operation of coin operated laundramats all of their economic advantages and in effect achieve destruction of the business. When regulation becomes destruction it ceases to be regulation. (Eighth Avenue Coach Corporation vs. City of New York, 286 N.Y. 84, 94, 35 N.E.2d 907, 911) (Id., at 697)

The Fire Marshal would distinguish Friendlyville since it is penal, calling for a fine of $50.00. Such a distincion fails. Not only would the granting of the petitioner

injunction have impact upon the respondent so many times greater than $50.00 as to be ludicrous, but the Fire Prevention Code itself purports to likewise require a fine and, in addition, provides for imprisonment. (See Fire Prevention Code, page 249, Section 14, "Penalties")

There is no doubt that the Legislature may enact legislation designed to promote and protect health and welfare. "Nonetheless the law requires that legislation regulating otherwise legally conducted business be reasonable, nondestructive and not unduly oppressive...If the... (rule) is unreasonable, unduly oppressive and destructive of legal enterprise, it is unconstitutional and invalid." (Friendlyville Enterprises vs. Village of Amityville, 217 N.Y.S2d 695, 697)

See also Oil City Center vs. City of

Yonkers, 53 Misc2d 191 (1961), where the court struck down an ordinance requiring service station attendants to obtain a certificate of fitness from a municipal Bureau of Combustibles. There the court held:

> All business and occupations are conducted subject to the police power. But, although such legislation carries with it a strong presumption of validity, due process demands that it be reasonably appropriate to the end sought to be accomplished. The City may not arbitrarily interfere with private business or impose unreasonable restrictions thereon under the guise of promoting the public welfare. (Id.)

The law in South Carolina is clearly to the same effect. In Stone vs. Salley, 244 S.C. 531, our court at page 538 held:

> The right of a citizen to engage in lawful business, to make contracts, and to dispose of his property, is not absolute; it is subject to regulation and control by the state in the exercise of its police power. But that power, though an essential attribute of sovereignty, is also not absolute; it may be exercised only

for the protection of the public in its health, safety, morals or general welfare. (Gasque, Inc. vs. Nates, 191 S.C. 271, 2 S.E.2d 36)

In the Gwynette case we also held that the State has the power to regulate and control the price that one in private business may charge for goods or services where such business is "affected with a public interest" and conversely it may not fix prices in a business not so affected is manifest not only from the fact that the police power is concerned with public, not private, welfare, but also for the reason that such governmental intermeddling with business essentially private in nature is repugnant to the fundamental concept of free enterprise.

We also held in the Gwynette case that whether or not the private status of a business with its attendant freedom from regulation has changed to one in which the public has such an interest as to justify its regulation by the State, is always a matter for judicial inquiry; the mere declaration by the Legislature that a business is affected with the public interest is not conclusive of such inquiry. The extent to which a business affected with a public interest may be regulated by the State is not a matter solely within the legislative discretion. It depends on the nature of the business, on the feature which touches the public, and on the abuse reasonably to be feared.

We also held in Gwynette that the State may not dictate prices in a private industry merely because the industry is large and important or because the publi may be concerned in respect of its maintenance, but such control is justifiable under the police power only when the industry is affected with the public interest in a sense that it may fairly be said that it has been devoted to the public use.

The attempted enjoining of the respondent's self-service operation would likewise work to the detriment of the public. It is uncontradicted in the record that the availability of gasoline on a 24-hour basis benefit both the local citizenry as well as the traveling public. Also, the self-service gasoline stations of the respondent, as well as others, provide gasoline at a lower unit cost to the citizens of this State. Further, ther is uncontradicted testimony that the competitive effect of self-service gasoline brings about a reduction in the price paid by the public at other type stations, again to t

ultimate advantage of the public.

It is exceedingly clear to the writer that the relief sought by the Fire Marshal constitutes the invalid and unalawful use of the State's police power and the regulation under which he asserts his authority is therefore void.

Nationally Recognized Standards

Title 37, Section 82.1 of the South Carolina Code (1962, as amended) provides:

> The State Fire Marshal shall requrie conformance with minimum fire prevention and protection standards, based upon nationally recognized standards, as may be set forth by regulation issued by the State Fire Marshal for the prevention of fire and for the protection of life and property. (Emphasis added)

Rather than adopting regulations which establsih "minimum" fire prevention and protection standards, the Fire

Marshal has adopted a generalized ordinance-type code designed by insurance personnel not concerned with "minimum" standards, but rather "good practice" (F.P.C., Section 1.1) or a more idealized concept. Thus, the Fire Marshal exceeded whatever authority he could properly be given in exceeding the "minimum" standards set forth in Section 37-82.1 of the South Carolina Code (1962, as amended).

Further, insofar as the Fire Marshal could be authorized to exercise informed discretion in order to make the Fire Prevention Code the law of this State, he has failed in carrying out this objective. He gave no notice of the contents in advertising public hearings prior to promulgation. He made no independent research or study as to any of the hundred of sections. Rather, he admittedly deferred

to the assumed expertise of a panel of individuals working for a private insurance association. Only one public agency in this State has ever concerned itself with the particular section requiring attendants at self-service gasoline stations. A subcommittee of the Fire Marshal's Advisory Committee was appointed to study the issue and made recommendations. Following a public hearing and after studying the matter, the subcommittee unanimously recommended deletion of the requirement for attendants. The Fire Marshal indicated to the Full Advisory Committee his disinclination to adopt such recommendation in any event and thereafter the Full Advisory Committee recommended reversal of the recommendation without further public hearings. Such vacillation and uninformed, discretionary exercise of power cannot, under our system,

be vested in appointed members of the executive branch of the government.

The writer, who has considerable experience in legislative matters, is satisfied that our General Assembly never intended to place such vast but unfettered discretionary power in the office of the State Fire Marshal, or any other such office, for that matter. I, therefore, hold that the office of the Fire Marshal exceeded the authority provided it under Section 37-82.1 of the South Carolina Code (1962, as amended) in attempting to promulgate and enforce the Fire Prevention Code.

Notice

The Fire Marshal has chosen to bring this matter before this Court sitting in Equity. Further, it has asked the court to wield its equity powers to enjoin

the respondent from the quiet enjoyment and use of his property.

Not only should these powers be exercised with restraint but the traditional concepts of fairness in equitable proceedings must be applied.

The record is clear and, in fact, uncontroverted that the respondent complied with all statutes and regulations indexed under "gasoline", "service station", or any similar term. The record shows that Department of Agriculture Rules were so indexed and the respondent complied with these.

The Fire Marshal's position is that he presented the Fire Prevention Code to the Secretary of State, and that the law is the law. However, "...a mistake of law may be corrected in equity." (27 Am Jur2d, Equity, 37, p. 562, citing

Trotter vs. Merchants and F. Bank, 180 S.C. 449, 186 S.E. 371, 105 A.L.R. 1512 (1936)) Further, where a person is ignorant or mistaken with respect to his own private legal rights and enters some legal transaction, the legal scope of which he understands, for the purpose of affecting such assumed rights or other relations, or carrying out assumed duties or liabilities, equity will grant relief either affirmatively or defensively, unless the alleged mistake of law is wholly caused by want of such diligence as should be used by every person of reasonable prudence. There can be no doubt that the respondent was diligent and that it would do extreme violence to the principles of equity to enjoin the business of the respondent under these circumstances.

Further, Section 1-17 of the South Carolina Code (1962, as amended) requires the placement of references to rules and regulations in the "index of the Code of Laws." This has simply not been done.

Section 17 of Article 3 of the Constitution provides: "Every Act or resolution having the force of law shall relate to but one subject and that shall be expressed in the title." This, of course, protects the General Assembly, and thereby the citizens of this State, from hidden or secret law. Can an appointed member of the executive branch of government create a rule with the force of law which has never been published, indexed or revealed to anyone but the Secretary of State? Certainly the equity side of the Court will prevent such. I am further of the opinion that a deprivation of property rights, sought here, would under the circumstances set forth,

constitute a denial of due process of law.

Due Process and Equal Protection of the Law

The vagueness of what is meant by a "qualified attendant" is not only troublesome constitutionally, but is even a problem to the Fire Marshal and his Advisory Committee. In the October 16, 1975, meeting of the Fire Marshal, his superiors and his Advisory Committee (See Respondent's Exhibit #2) the subject received the concerned attention of those present:

> Mr. Kahn said that he felt some investigation of the Fire Prevention Code should be made as to the qualifications of the attendant required to be on duty at a service station; possibly a better definition of the word "attendant". Mr. Carlisle suggested that his question be presented to the Fire Prevention Code Committee and a report made back to the Advisory Committee for discussion. Mr. Coney's and Mr. Kahn's questions were to an attendant's duties and responsibilities and not to his qualifications. Mr. Gunter stated that in

his opinion the Code was being violated due to the fact that the Code states, "it shall be the primary duty of the attendant to supervise the dispensing of gasoline." (Emphasis original) ....Mr. Kahn also raised the question as to whether a person in charge of a grocery store or convenience store is a qualified attendant since their primary duties are not the dispensing of gasoline according to the Code. Mr. Colvin stated that this question would more than likely be settled in court. (Minutes, Fire Marshal's Advisory Committee Meeting, October 16, 1975, Respondent's Exhibit #2)

The evidence is uncontroverted that the Fire Marshal's office applies the rule at issue so that any individual meets the requisite qualifications. The evidence adduced showed this application extended to a ten-year-old youth, without the education or ability to read or write; to elderly individuals with failing eyesight and health; to individuals whose primary duties involved food sales in "mom and pop" and convenience stores remotely located from self-service pumps.

On the other hand, the Fire Marshal

takes the position that a motorist, mentally and physically capable of operating a dangerous instrument like such as a motor vehicle, duly licensed following a written and highway examination, and meeting minimum age requirements would not be such a qualified attendant to satisfy the regulation.

Further, the Fire Marshal does not require an attendant, other than the motorist at key lock activated stations, at governmental agency stations, at prison facilities where prisoners qualify, on farms and in large bulk terminals.

Such application of the term "qualified attendant" by the Fire Marshal is vague at best and irrational at worst.

In State vs. Standard Oil of New Jersey, et al., 195 S.C. 267, 10 S.E.2d 778 (1940), the defendants challenged the constitutionality of a statute preventing

sales of gasoline in one "section" of a city at lower cost than in another on the basis of the vagueness and uncertainty of the proscribed acts as well as the irrationality of the means to accomplish the term "section" was so vague and uncertain as to constitute denial of due process of law. The standard applied was whether men of common intelligence must necessarily guess at its meaning. It is clear to the writer that common men as well as experts must conjecture as to the meaning of "qualified attendant" in the context of the Fire Prevention Code, as evidenced by the testimony at the hearing as well as the remarks of the members of the Advisory Committee set forth above.

Further, the Court in the Standard Oil case held that the statute was unreasonable, arbitrary and capricious in

that the means selected for accomplishing the stated purposes had no real, substantial relationship to the object to be obtained and, specifically, that the act was unreasonable and arbitrary because it did not permit a vendor to charge different prices based upon quantity sold. The result was not only irrational, but would cause loss of price reductions and was, therefore, not in the public interest (Id., 195 S.C. 267, 281-287) The application of the term "qualified attendant" by the Fire Marshal is quite clearly irrational and unrelated to the stated purpose of safety. It likewise is not in the public interest and deprives the public of a significant savings.

It is the opinion of the writer that the Fire Prevention Code, as interpreted by the Fire Marshal and as applied to the respondent so as to deny him the effective use of his property, clearly exceeds the

constitutional boundaries set by due process of law in this State and Nation.

In addition, such arbitrary and irrational classification as approving children, illiterates, remotely located food sales personnel, key-lock operations, prison camp and farm operations while disapproving only the respondent's operation constitutes a clear denial of equal protection of the law. "The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. It also imposes a requirement of some rationality in the nature of the class singled out. But The Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purposes for which the classification is made'."

U. S. Fid. and Guaranty

Co. vs. City of Newberry, 257 S.C. 433, 440, 186 S.E.2d 239 (1972) "While good faith and a knowledge of existing conditions on the part of a legislature are to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the fourteenth amendment a mere rope of sand, in no manner restraining state action.: (ID., 257 S.C. 433, 441)

Lack of Statutory Authority

The Fire Marshal's enforcement authority is derived from Section 37-82.2 of the South Carolina Code (1962, as amended) which states, in pertinent part:

> Whenever the state fire marshal, deputy or resident fire marshal shall find, pursuant to an examination as provided in 37-82 of this article, any building or

other structure which for any cause, is especially liable to fire and which is so situated as to endanger lives or other property, or is deficient in fire or life protection, an order shall issue in writing directing the defect be removed or remedied, service of such order shall be made as provided in this article and such occupant or owner shall forthwith comply with the terms thereof.

.....

...(W)hen a final order has been issued and such order is not complied with within thirty days or a greater time if specified in such order, (the fire marshal may) apply to the court of common pleas in the circuit where the property concerned is located for an injunction to compel the defect to be removed or remedied and the court, if it shall find that such defect constitutes a dangerous hazard to life or property as set forth in this section, may exercise its injunctive powers to obtain compliance with the order of the fire marshal. (37-82.2 South Carolina Code (1962, as amended)) (Emphasis added.)

Obviously, there has been no finding by the Fire Marshal or showing before this court that examination has been made of any building or structure of the respondent, which examination revealed any such deficient or defective condition as contemplated

by the statute.

Rather than making such finding, the Fire Marshal has simply concluded that a paid attendant would render the station safer than it presently is. The enforcement powers granted him have been given quite precise limitations and the relief sought against the respondent clearly exceeds such limits.

The Fire Marshal was quite candid, both at the hearing and in the Briefs furnished the writer, in declaring that he believes he has the authority to "legislate" in this area and to shut down legitimate businesses which violate standards which he, alone, has promulgated. (See Petitioner's Reply Brief, 30, p. 5) Without hesitation, I hold that the General Assembly of this State has the exclusive authority to legislate and to hold otherwise would violate the principle of the three co-equal branches

of government, the bedrock of our form of government.

Delegation of Legislative Authority

The Fire Marshal cites as authority for the promulgation of the comprehensive, two hundred seventy-three (273) page document known as the Fire Prevention Code (1973 edition), Section 37-82.1 of the South Carolina Code (1962, as amended) which reads in full:

> The fire Marshal shall require conformance with minimum fire prevention and protection standards, based upon nationally recognized standards, as may be set forth by regulation issued by the State Fire Marshal for the prevention of fire and for the protection of life and property. (37-82.1 South Carolina Code (1962, as amended))

Our Supreme Court has had numerous opportunities to consider the improper us of legislative authority by administrative agencies. The basic principle is as follows·

> Of course, the Legislature cannot delegate its power to make laws, although it may vest in administrative officers and bodies a large measure of discretionary authority, especially to make rules and regulations relating to the enforcement of the law. (Argent Lumber Co. vs. Query, 178 S.C. 1, 182 S.E. 93; Stovall vs. Sawyer, 181 S.C. 379, 187 S.E. 821; Fisher vs. Sheridan Co., Inc. 182 S.C. 316, 189 S.E. 356, 108 ALR 981; One Hun. Sec. Cav. Offs.' Club vs. Heise, Sheriff, 201 S.C. 68, 75)

But there is a vast distinction between "legislation" on the one hand, and "regulation," on the other. (52A C.J.S., Legislation, p. 764)

In the Case of Gasque, Inc. vs. Nates, 191 S.C. 271, at page 292, our court stated:

> It has been consistently held by our Supreme Court that when an act is complete on its face no unconstitutional delegation of legislative authority can be imputed to it by the fact that authority or discretion as to its execution is vested in an administrative officer, commission or board.
>
> There is a distinction, however, between delegating power to make a law and conferring authority or discretion as to its execution. If a legislative act is clothed with all the forms of law and

> is complete in itself in form and substance, if the officer, board or commission to whom the authority is alleged to have been delegated is given no power to add or take away from the law as enacted, if nothing is left to discretion as to what shall constitute the form and substance of the statute, and if the act embodies a full and complete expression of the legislative will, matters which may be fairly regarded as relating to the administration and execution of the statute, even though involving discretion, do not constitute an unauthorized delegation of legislative authority. (Emphasis added)

This analysis is in stark contrast to the position of the Fire Marshal who states (Petitioner's Reply Brief, page 5, Item 30):

> It is the responsibility of Petitioner (the Fire Marshal) to legislate safety standards. (Emphasis added)

Thus, the Fire Marshal's position is that he, alone, has authority to legislate certain mandatory standards, to investigate alleged violators, to order the alleged violations to cease,

and, failing that, to have the operation enjoined. His authority is not so extensive.

> It is a fundamental principle of our system of government that the rights of men are to be determined by the law itself, and not by the let or leave of administrative officers of bureaus. This principle ought not to be surrendered for conveniences, or in effect nullified for the sake of expediency. (42 Am. Jur., Public Administrative Law, Section 45, page 342)

In Banks vs. Batesburg Hauling Co., et al., 202 S.C. 273, at page 281, the court noted:

> Clearly a rule cannot be made by an administrative body which would materially alter or add to the law; a rule to be valid may only implement the law. (Emphasis added)

Both the Petitioner and the Respondent agree that the case of South Carolina Highway Department vs. Harbin, 226 S.C. 585, 86 S.E.2d 466 (1955) is controlling and is dispositive of the issue of the

exercise of legislative authority.

In Harbin, the Highway Department issued a concise regulation setting up a point system for traffic violations, pursuant to a statute purportedly authorizing it. The system was similar to our present point system and the desirability or wisdom of any administrative "legislation" is not the issue.

Just as in the instant case, the entire substance of the "regulation" was the product of the administrative body. In Harbin, only a short and concise point system was promulgated, however, while in the instant case, several hundred far-ranging pages were issued. Also in Harbin, property rights were not at issue as they are in this case. Thus, even though the administrative body in Harbin acted with considerably more restraint in asserting

its assumed authority, nevertheless our Court found such action to be the unlawful exercise of legislative authority.

> The question of delegation of legislative power has confronted the courts with many perplexing problems, particularly during recent years when the complexities of government have been constantly on the increase. It is well settled that while the Legislature may not delegate its power to make laws, in enacting a law complete in itself, it may authorize an administrative agency or board 'to fill up the details' by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. (Citations omitted) However, it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interest and with such degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interests and private rights shall have due consideration. (S.C. Hwy. Dept. vs. Harbin, 226 S.C. 585, 594; 86 S.E.2nd 466 (1955)
>
> ....

> A statute which in effect reposes an absolute, unregulated and undefined discretion in an administrative body bestows arbitrary powers and is an unlawful delegation of legislati powers. (Id, 226 S.C. 585, 595)

The Fire Marshal contends that Section 37-82.1 of the South Carolina Code (1962, as amended) consisting of one sentence, without substance or direction, authorized the promulgation of some two hundred seventy-three pages of substantive law. Clearly such an act does not permit the mere "filling up the details" as required by Har in. It is, therefore, abundantly clear to me, and I so hold, that the attempted promulgation and enforcement by the Fire Marshal of the substantive provisions of the Fire Prevention Code before me, namely Sections 16.74 and 16.75(f)(1), constitute the unlawful exercise of legislative authority and are,

therefore, void and of no effect.

For all of the reasons set forth hereinabove, the relief sought by the Petition of the Fire Marshal is denied and the Rule To Show Cause discharged.

AND IT IS SO ORDERED.

/s/Robert W. Hayes
ROBERT W. HAYES
Resident Judge
Sixteenth Judicial Circuit

Rock Hill, S. C.

March 8, 1976

APPENDIX "B"

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Jesse C. Johnson,
Fire Marshal of the
State of South Carolina, . . .Appellant,

v.

Melvin L. Roberts, ...Respondent.

Appeal From York County
Robert W. Hayes, Judge

Opinion No. 20460
Filed June 29, 1977

REVERSED AND REMANDED

Attorney General Daniel R. McLeod, Assistant Attorneys General Edward B. Latimer and Joseph R. Barker, and Ronald H. Colvin, all of Columbia, for appellant.

Robert R. Carpenter, of Roddey, Sumwalt & Carpenter; Emil W. Wald, of Spencer & Spencer, all of Rock Hill; and Levy S. Alford, of York, for respondent.

LEWIS, C. J.: Appellant, State Fire Marshal, brought this action to restrain respondent from operating self-service gasoline stations unless a qualified attendant was on duty whenever the stations were open to the public, as required by the Fire Prevention Code, particularly Seactions 16.74 and 16.75(f)(i), (Volume 17, 1975 Cum. Supp., pp. 159, 161, and 162, Code of Laws). The lower court denied the relief sought upon the ground that the provisions of the Fire Prevention Code relied upon were unlawful; and this appeal is from that decision.

While subsidiary questions are involved, the basic issue to be decided is whether the promulgation of the pertinent provisions of the Fire Prevention Code by the State Fire Marshal constituted an unlawful exercise of legislative

authority. The violation of the regulations in question by respondent is admitted.

The General Assembly created the office of the State Fire Marshal and placed upon him certain duties and responsibilities with reference to fire prevention. Section 37-80 of the 1962 Code of Laws, as amended. The general duties of the State Fire Marshal are set forth in Code Section 37-81 as follows:

It shall be the duty of the State Fire Marshal to enforce all laws and ordinances of the State, and the several counties, cities, and political subdivisions thereof, with reference to the following:

> (a) The prevention of fires;
> (b) The storage, sale and use of combustibles and explosives;
> (c) The installation and maintenance of automatic or other

> fire alarm systems and fire extinguishing equipment;
> (d) The construction, maintenance and regulation of fire escapes;
> (e) The means and adequacy of exits, in case of fire, from factories . . . and all other places in which numbers of persons work, live or congregate . . .;
> (f) Investigation of the cause, origin and circumstances of fire.

The foregoing general authority of the State Fire Marshal in fire prevention to protect life and property was further defined in Code Section 37-82.1 and the authority to promulgate rules and regulations for the enforcement of the statutory safety requirements was granted in Code Section 37-82.7, as follows:

37-82.1. The State Fire Marshal shall require conformance with minimum fire prevention and protection standards, based upon nationally recognized

standards, as may be set forth by regulation issued by the State Fire Marshal for the prevention of fire and for the protection of life and property.

37-82.7. The State Fire Marshal shall see that the provisions of this article are faithfully executed, and to that end he may make rules and regulations to carry out the provisions of this article.

The Fire Marshal, acting under the foregoing statutory authorization to prevent fires and protect life, adopted the Fire Prevention Code recommended by the American Insurance Association, which was filed in the office of the Secretary of State as required by Code Section 1-11, as amended. The Fire Prevention Code requires that each gasoline service station in this State shall have an

attendant on duty whenever the station is open to the public for business. The pertinent sections provide:

Seaction 16.74. Each service station open to the public shall have an attendant or supervisor on duty whenever the station is open for business.

Section 16.75. Dispensing Systems.

. . . .

F. Special Type Dispensers.

(1) Approved special dispensing devices such as, but not limited to, coin-operated, cord-operated, and remote preset types are permitted at service stations, provided there is at least one qualified attendant on duty while the station is open to the public. The attendant's primary function shall be to supervise, observe and control the dispensing of Class I

liquids while said liquids are being dispensed. It shall be the responsibility of the attendant to prevent the dispensing of Class I liquids into portable containers not in compliance with Section 16-73e, control sources of ignition, and to immediately handle accidental spills and fire extinguishers if needed.

(2) The attendant or supervisor on duty shall be capable of performing the functions and assuming the responsibilities covered in Section 16.75(f)(i)

. . . .

The question of whether the adoption of the foregoing provisions of the Fire Prevention Code constituted an unlawful exercise of legislative authority involves, first, a determination of whether Code Section 37.82.1 is an unconstitutional delegation of legislative

power to the Fire Marshal and, second, if a lawful delegation, whether the Fire Marshal exceeded the authority granted him by adopting these particular provisions.

The general principles governing the limitations upon the authority of the Legislature to delegate legislative power were stated in South Carolina State Highway Department v. Harbin, 226 S. C. 585, 86 S. E. 2d 466, as follows:

"It is well settled that while the legislature may not delegate its power to make laws, in enacting a law complete in itself, it may authorize an administrative agency or board 'to fill up the details' by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. (citing cases).

'However, it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interests and with such degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interests and private rights shall have due consideration." State v. Stoddard, 126 Conn. 623, 13 A. 2d 586, 588.

The first question then becomes whether Section 37-82.1 is "a law complete in itself," laying down a legislative policy and primary standards, to which the Fire Marshal must conform. As the court stated in Cole v. Manning,

240 S. C. 260, 125 S. E. 2d 621, the answer is a difficult one:

"A difficulty that confronts the court when a delegated power is challenged lies not in the foundation of principles that should govern the decision, but in their application to the facts and circumstances of the particular case at hand. For it is apparent, from consideration of the numerous cases on the subject, that the degree of authority that may lawfully be delegated to an administrative agency must in large measure depend upon such circumstances, including the legislative policy as declared in the statute, the objective to be accomplished, and the nature of the agency's field of operation."

The purpose for which the Fire Marshal may promulgate regulations under

Section 37-82.1 is "for the prevention of fire and for the protection of life and property." The primary standard set by the statute to govern the Fire Marshal in adopting regulations is that he shall "require conformance with minimum fire prevention and protection standards, based upon nationally recognized standards."

The statute authorizes the adoption of regulations governing the broad field of fire prevention. The question is whether the requirement, that the regulations adopted be minimum fire prevention standards "based upon nationally recognized standards," constitutes such a limitation on the discretionary authority of the Fire Marshal as to make the delegation constitutional.

The statute does not define the term "nationally recognized" and, under settled principles, the words used will be given their usual and generally accepted meaning. The word "nationally" means with regard to, affecting, or involving a nation as a whole. Webster's Third International Dictionary; Black's Law Dictionary, 4th ed. The phrase "nationally recognized standards," then, means standards recognized or adopted in at least a majority of the States. The discretion of the Fire Marshal in adopting regulations is so limited. In other words, he is prohibited from adopting a regulation unless it sets forth a fire prevention rule to which people in a majority of the States of the United States are required to comply.

We think the foregoing interpretation of "nationally recognized" gives effect to its reasonable meaning and sets an

intelligible standard to which the Fire Marshal must conform. The authority granted under Section 37.82.1 to adopt regulations is, accordingly, not an unconstitutional delegation of legislative power.

We next consider whether the adoption by the Fire Marshal of the particular regulations exceeded the authority granted to him by the statute.

The statute (Section 37.82.1) directs that any regulations adopted by the Fire Marshal shall require conformance with minimum fire prevention and protection standards. The Fire Prevention Code states that "it is the intent of this Code to prescribe regulations consistent with nationally recognized good practice for the safeguarding to a reasonable degree of life and property

from the hazards of fire and explosion." (Emphasis added). It is argued that, since the Fire Prevention Code states that it is intended to prescribe regulations consistent with nationally recognized "good practice," it attempts to prescribe a different and higher requirement than "minimum standards" referred to in the statute.

There is no merit in the foregoing argument. The use of the words "nationally recognized good practice for the safeguarding to a reasonable degree of life and property" in the Fire Prevention Code is not inconsistent with the statutory requirement that the regulations conform to nationally recognized minimum standards for the prevention of fire. The record shows that it was the intent of the Fire Prevention Code to conform

to national minimum standards.

It remains to be determined whether Sections 16.74 and 16.75(f) of the Fire Prevention Code constitute minimum fire prevention standards which are nationally recognized. According to a survey made by the Fire Marshal, the regulations requiring an attendant at self-service gasoline stations were in effect in at least twenty-seven (27) states. The regulations in question, therefore, conform to nationally recognized minimum standards as required by Section 37-82.1.

The regulations are further challenged upon the ground that requiring an attendant is beyond the enforcement powers of the Fire Marshal and, therefore, the promulgation of such a regulation exceeded his statutory authority. The enforcement powers of the Fire Marshal

are set forth in Code Section 37-82.2. This section provides that whenever he finds that any building or other structure which is especially liable to fire and is so situated as to endanger lives or other property, "or is deficient in fire or life protection," an order shall be issued directing the "defect to be removed or remedied." It is argued that the enforcement powers of the Fire Marshal are thus limited to requiring defects in "any building or other structure" remedied and that the failure to provide an attendant or personnel at the station does not constitute such a defect. It is apparent that no such restructed meaning was intended.

The statute directs that an order be issued requiring the defect to be remedied whenever the Fire Marshal finds that any

building or other structure is especially liable to fire "or is deficient in fire or life protection." The term defect, as used in the statute, clearly embraces a deficiency in fire or life protection whether caused from the structural condition of the building or the failure to maintain required personnel or other safety measurers. The regulation requiring an attendant was, therefore, not beyond the enforcement powers granted by the statute.

We find no merit in the further contention that the term "qualified attendant" is so vague that the provisions of the regulation violate respondent's right to due process of law. The regulations require that there be a "qualified attendant" on duty while the service station is open for business; and that

his duties are to "supervise, observe and control the dispensing of Class I liquids."

The term "qualified attendant" is not vague and indefinite. The word qualified means that the attendant has to be capable and competent to perform the duties specified. A person of common intelligence, we think, would be able to determine without difficulty whether an attendant was competent to supervise, observe and control the dispensing of gasoline at a service station.

It is also charged that the Fire Marshal has engaged in discriminatory enforcement of the present regulations by attempting to enjoin respondent's operations while failing to take any action against self-service gasoline operations conducted in connection with

convenience stores. Such action of the Fire Marshal is termed an arbitrary classification, depriving respondent of his constitutional rights to due process and equal protection of the law.

The record fails to support the charge of discriminatory classification and enforcement with respect to respondent's business operations. The basis for distinguishing between respondent's self-service business and that of the mentioned convenience stores is evident- the latter maintains an attendant while the business is open to the public and, according to the testimony of the Fire Marshal, the failure of this attendant to supervise the dispensing of gasoline would constitute a violation of the regulation. We fail to find evidence of discriminatory enforcement such as

to deny respondent equal protection or due process of law.

Respondent further contends that the authority of the Fire Marshal to adopt the regulation in question has been pre-empted by the Federal Occupational Safety and Health Act. This law was enacted to insure the safe and healthful working conditions of American workers and established a regulatory scheme applicable to employees and businesses affecting interstate commerce. 29 U. S. C. 655.

While at one time Federal regulations, adopted pursuant to the Occupational Safety and Health Act, required an attendant on duty at self-service gasoline stations, that regulation was deleted on March 15, 1974 and is no longer a Federal requirement.

There is, therefore, no Federal law dealing with the requirement of an

attendant at a self-service gasoline station and consequently no question of Federal preemption of the regulation involved in this case. In fact, the Federal Statute states (29 U. S. C. 667):

Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under Section 655 of this title.

Gasoline is a highly flammable liquid which can be extremely dangerous, and its sale to the public under careful supervision and enforcement of proper safety practices by competent personnel is reasonably related to the public health, safety, and welfare. The regulation that an attendant be on duty when

gasoline is being dispensed is, under this record, a reasonable requirement for the prevention of the loss of life and property and, as such, is a proper exercise of the police power. If any change in the regulation is desired, it must be either by regulation of the Fire Marshal or by legislative action. The court has no right to make such change.

Since the regulations, here involved and to which this opinion is confined, were promulgated pursuant to constitutional statutory authority, they have the force and effect of law.
Mace v. Berry, 225 S. C. 160,
81 S. E. 2d 276.

Reversed and remanded for further proceedings consistent with the foregoing

views.

LITTLEJOHN, NESS, RHODES and GREGORY, JJ., concur.

APPENDIX "C"

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Ex Parte:	)	
	)	
Melvin L. Roberts,	)	
	)	
Petitioner,	)	
	)	
In Re:	)	
	)	
Jesse C. Johnson, Fire Marshal of the State of South Carolina,	)	PETITION FOR REHEARING
	)	Opinion No. 20460
Appellant,	)	
	)	
vs.	)	
	)	
Melvin L. Roberts,	)	
	)	
Respondent.	)	

The Petitioner, pursuant to Rule 17, Section 2 of the South Carolina Supreme Court Rules hereby petitions for a rehearing in the above matter with regard to following points overlooked or misapprehended by the Court:

1. That the promulgation and en-

forcement of Sections 16.74 and 16.75 (f) (1) of the Fire Prevention Code constitutes the invalid and unlawful use of the State Police Powers and deprived Petitioner his liberty and his property without due process of law and denied Petitioner the equal protection of the laws as provided in Article I, Section 3 of the South Carolina Constitution and Section 1 of the 14th Amendment of the United States Constitution by requiring attendants at self-service stations to correct an allegedly dangerous situation where no dangerous situation existed, and no evidence was introduced to show a single fire due to the self-service gasoline stations have been in existence for over 35 years in the United States and for over 5 years in the State of South Carolina.

2. That Petitioner was denied the Constitutional guarantees of due process and equal protection of the laws under the South Carolina and Unted States Constitutions when he was singled out for enforcement and when other installations exactly like Petitioner's accepting dollar bills without attendants, using keys or cards to turn on the pumps without any attendants (key lock and card operations) and Mom and Pop Country store operations where the customer, without any attendant being present, pumps his own gas and goes inside to pay (we are not here alluding to the convenience store operation with remote preset controls inside which was covered in the opinion), were left to operate as usual and without any enforcement being taken against them.

3. That one of the cardinal rules

of this Court as set forth in numerous decisions is that the Supreme Court will not disturb findings below where they have evidentiary support in the record and not against the clear preponderance of the evidence. The Court below found:

> I further find as a fact that the petitioner has demonstrated no need for the requirement of attendants and, to the contrary, the clear evidence is to the effect self-service currency operated gasoline dispensing stations are as safe or safer than conventional, attended gasoline service stations due to the unique characteristics of the new currency operated and automated self-service installations.

This finding is amply supported by the evidence and in fact there is no evidence to the contrary. The Court overlooked and failed to pass on this issue, which eliminates the very cornerstone and only basis for the Appellant's position and the regulation requiring attendants.

4. The Court below found as a fact

and held that the regulations of the Fire Marshal, including the requirement of attendants at self-service gasoline stations, were not indexed in the South Carolina Code in the Rules and Regulations volume and Respondent had no notice of the requirement of an attendant at a self-service gasoline dispensing station at the time such station was constructed; that Respondent was diligent and complied with all regulations of the Agriculture Department indexed under "Gasoline", and that it would do extreme violence to the principles of equity to enjoin the business of the Respondent under these circumstances. This Court overlooked and failed to pass on this issue.

5. That the Court below found as a fact that the Respondent was in compliance with the Fire Prevention Code by compliance

with "other approved nationally recognized safety standard" as required by that Code. This Court overlooked and failed to pass upon this issue.

6. That at the time of commencement of the action below by the Fire Marshal (February 6, 1973), the OSHA regulation as to attendants in currency operated dispensing stations was in full force and effect, thus rendering the Fire Marshal's regulation void for conflice with the Supremacy Clause of the United States Constitution, and that the subsequent deletion (March, 1976) could not revitalize the void regulation without additional promulgation by the Fire Marshal. This Court overlooked or misapprehended this issue.

7. That in holding that a standard adopted by a bare majority (27) of the

states which Appellant contends is unsupported by competent evidence meets the Court's definition of a "nationally recognized" standard as being "with regard to, affecting or involving the nation as a whole", the Court has misapprehended the meaning of such definition and the long range precedential effect of such interpretation.

8, That the Court overlooked or misapprehended each of the above points and failed to pass on them. That each of the above points should be ruled upon, and, if ruled upon, each would have to be decided adverse to this Petition before a reversal of the Judgment below could be in order.

WHEREFORE, Petitioner prays that the Supreme Court grant a rehearing in the

above cause.

Roddey, Sumwalt and Carpenter

BY: /s/Robert R. Carpenter
Robert R. Carpenter

Spencer and Spencer, P. A.

BY: /s/ Emil W. Wald
Emil W. Wald

/s/ Levy S. Alford
LEVY S. ALFORD
ATTORNEYS FOR PETITIONER

York, South Carolina

July 6, 1977

STATE OF SOUTH CAROLINA)
) VERIFICATION
COUNTY OF YORK)

PERSONALLY appeared before me, Melvin L. Roberts, who, being first duly sworn, deposes and says that he is the Petitioner in the foregoing action; that he has read the foregoing Petition and the same is true and correct of his own knowledge, except those matters and things alleged on information and belief, and as to those, he believes them to be true.

/s/ Melvin L. Roberts
MELVIN L. ROBERTS

SWORN to before me this 6th day of July, 1977.

/s/ Cheryl P. Boyd (SEAL)
Notary Public for South Carolina

My Commission Expires: 9/17/86

CERTIFICATE OF COUNSEL NOT
CONCERNED IN THE CASE

I, W. M. Brice, Jr., Attorney at Law, York, South Carolina, hereby certify that I am a practicing attorney in the City of York, that I am not concerned in the above entitled case, that I have studied the within Petition, the transcript of the case on appeal, the briefs of appellant and respondent and the opinion of this Court dated June 29, 1977 and am of the opinion there is merit in the grounds stated in the above Petition for Rehearing.

/s/ W. M. Brice, Jr.
W. M. BRICE, JR.
Attorney at Law
York, South Carolina

York, South Carolina

July 6, 1977

BEST COPY AVAILABLE

APPENDIX "D"

THE SUPREME COURT OF SOUTH CAROLINA

FRANCES H. SMITH
Clerk

P. O. Box 11330
Columbia, S. C.
29211

August 5, 1977

Levy S. Alford, Esquire
Attorney at Law
P. O. Box 460
York, South Carolina 29745

Re: Jesse C. Johnson, Fire Marshal
of the State of South Carolina
v. Melvin L. Roberts

Dear Mr. Alford:

The Court has this day refused your Petition for Rehearing in the above case in the following order:

"Petition denied.

/s/ J. Woodrow Lewis, C.J.

/s/ Bruce Littlejohn, A.J.

/s/ J. B. Ness, A.J.

/s/ Wm. L. Rhodes, Jr., A.J.

/s/ George T. Gregory A.J."

The remittiture is being sent down today.

Very truly yours,

/s/ Frances H. Smith
CLERK

FHS/rl

CC: The Honorable Joseph R. Barker
Assistant Attorney General
P. O. Box 11549
Columbia, South Carolina 29211

APPENDIX "E"

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Jesse C. Johnson, Fire Marshal of the State of South Carolina,

Appellee,

vs.

Melvin L. Roberts,

Appellant.

NOTICE OF APPEAL

TO

THE SUPREME COURT
OF THE UNITED STATES

TO: Jesse C. Johnson, Fire Marshal of the State of South Carolina and his attorneys, Attorney General Daniel R. McLeod, Assistant Attorneys General Edward B. Latimer and Joseph R. Barker, and Ronald H. Colvin:

Notice is hereby given that Melvin L. Roberts, the appellant above-named, hereby appeals to the Supreme Court of the United States from Opinion No. 20460

Filed June 29, 1977, Rehearing denied August 5, 1977.

This appeal is taken pursuant to 28 U.S.C. 1257.

The clerk will please prepare a transcript of the entire record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript all exhibits.

The following questions are presented by this appeal:

1. Did the promulgation, adoption and enforcement of Sections 16.74 and 16.75 (f) (1) of the Fire Prevention Code promulgated by appellee pursuant to sec. 37-82.1 of the 1962 South Carolina Code of Laws constitute the invalid and unlawful use of the State Police Powers and deprive Petitioner of his liberty and his property without due process of law and

deny Petitioner the equal protection of the laws as provided in the Fifth Amendment and Section 1 of the 14th Amendment of the United States Constitution by requiring attendants at self-service stations to correct an allegedly dangerous situation where no dangerous situation existed, and where no evidence was introduced to show a single fire due the self-service feature at any gasoline station at any time anywhere in the world, although self-service gasoline stations have been in existence for over 35 years in the United States and for over 5 years in the State of South Carolina?

2. Was Petitioner denied the Constitutional guarantees of due process and equal protection of the laws under the United States Constitution amendment 5 and Section 1 of the 14th when he was

singled out for enforcement of Section 16.74 and 16.75 (f) (1) of the Fire Prevention Code when other installations exactly like Petitioner's accepting dollar bills without attendants, using keys or cards to run on the pumps without any attendants (key lock and card operations), and Mom and Pop country store operations where the customer, without any any attendant being present, pumps his own gas and and goes inside to pay and convenience stores where the customer pumps his own gas without any attendants being present and goes inside to pay, were all left to operate as usual and without any enforcement being undertaken against them?

3. Did the Occupations Safety and Health Act of 1970 (29 U.S.C. 655) preempt Sections 16.74 and 16.75 (f) (1) of the Fire Prevention Code by virtue of the

Supremacy Clause of the United States Constitution?

Roddey, Sumwalt and Carpenter

/s/ Robert R. Carpenter
ROBERT R. CARPENTER

Spencer and Spencer, P.A.

/s/ Emil W. Wald
EMIL W. WALD

/s/ Levy S. Alford
LEVY S. ALFORD

ATTORNEYS FOR APPELLANT

August 9, 1977

York, South Carolina

Supreme Court, U. S.
FILED
JAN 23 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

NO. 77-636

Melvin L. Roberts,

Appellant,

versus

Jesse C. Johnson, Fire Marshal of the State of South Carolina,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

MOTION TO DISMISS

DANIEL R. McLEOD
Attorney General

C. TOLBERT GOOLSBY, JR.
Deputy Attorney General

P. O. Box 11549
Columbia, S. C. 29211

ATTORNEYS FOR APPELLEE

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

NO. 77-636

Melvin L. Roberts,

Appellant,

versus

Jesse C. Johnson, Fire Marshal of the State of South Carolina,

Appellee.

MOTION TO DISMISS

Pursuant to Rule 16(1)(b) of the Revised Rules of the Supreme Court of the United States, Jesse C. Johnson, Fire Marshal of the State of South Carolina, the appellee in the above-entitled action, moves the Court to dismiss the appeal herein on the ground that it is manifest that a substantial federal question is not presented.

QUESTION PRESENTED

Whether the appellant has demonstrated that his challenge to certain regulations of the State Fire Marshal of the State of South Carolina presents a substantial federal question?

STATEMENT

The State Fire Marshal on February 8, 1973, instituted an action in the Court of Common Pleas for York County, South Carolina, to enjoin the appellant Melvin L. Roberts from operating self-service gasoline stations unless a qualified attendant was on duty in order, among other things, to supervise, observe, and control the dispensing of gasoline as required by

Sections 16.74[1] and 16 F(1)[2] of the Fire Prevention Code. When the Court of Common Pleas denied the State Fire Marshal the relief which he sought and invalidated the provisions of the Fire Prevention Code on

---

1/ Each service station open to the public shall have an attendant or supervisor on duty whenever the station is open for business.

2/ Dispensing Systems.

. . .

F. Special Type Dispensers.
(1) Approved special dispensing devices such as, but not limited to, coin-operated, cord-operated, and remote preset types are permitted at service stations, provided there is at least one qualified attendant on duty while the station is open to the public. The attendant's primary function shall be to supervise, observe and control the dispensing of Class I liquids while said liquids are being dispensed. It shall be the responsibility of the attendant to prevent the dispensing of Class I liquids into portable containers not in compliance with Section 16-73e, control sources of ignition, and to immediately handle accidental spills and fire extinguishers if needed.

which he based his complaint, he appealed to the Supreme Court of South Carolina. The latter upheld the questioned provisions of the Fire Prevention Code, reversing the Court of Common Pleas and remanding the case for further proceedings.

REASONS FOR GRANTING MOTION TO DISMISS

Rule 15(e) of the Revised Rules of the Supreme Court of the United States prescribes that the Jurisdictional Statement shall contain, among other things, "the reasons why the questions presented are so substantial as to require plenary consideration." Although the appellant has set forth three questions which he claims raise substantial federal issues [J.S. at 7-8], nowhere does he include the reasons why those questions are substantial enough to warrant plenary consideration by this Court. [J.S. at 15-20]. Instead, he merely argues that he has a right of appeal when substantial federal questions are involved. The failure to state the grounds for believing his questions are substantial is itself an indication that the federal questions purportedly here involved lack substantiality. That they

do in fact lack substantiality is made clear below.

The appellant claims, first of all, that the adoption by the State Fire Marshal of the regulations complained of was an unreasonable exercise of the State's police powers because, he says, "there was no evidence introduced to show a single fire due to the self-service feature at any gasoline station" and also because "there had been no showing of any reasonable relationship between the deprivation of appellant's rights and any actual and manifest evil." [J.S. at 7]. Not long ago, this Court acknowledged that its function in reviewing a state statute is a limited one. Mr. Justice Powell, speaking for the Court, said,

> We do not inquire whether [the] statute is wise or desirable, or "whether it is based on assumptions scientifically substantiated." Roth v. United States, 354 U.S. 476, 501, 1 L.Ed.2d

> 1498, 1516, 77 S.Ct. 1304 (1957) (Separate Opinion of Harlan, J.). Misguided laws may nonetheless be constitutional. ...Our task, however, is not to weigh [a] statute's effectiveness but its constitutionality. James v. Strange, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 at 606 (1972).

The validity of the regulations in question, we submit, does not depend upon whether or not there has been a fire at a self-service gasoline station. It is enough that the possibility exists that a fire will break out at such a place, or that gasoline dispensed thereat might be mishandled or misused and that, as a consequence, injury to life or property might result. Indeed, the State Supreme Court found, contrary to the appellant's position, that the promulgation of those regulations was a reasonable exercise of the State's police powers and that those regulations are "reasonably related to the public health, safety, and welfare" [J.S. at

105-106], as in fact they are. Quite clearly, the requirement that an attendant be present at a self-service gasoline station, as at any other station, for the purpose of supervising, observing and controlling the dispensing of gasoline, preventing the dispensing of gasoline into proscribed containers, controlling sources of ignition, and handling immediately accidental spills and fire extinguishers, if such be required, bears a reasonable relation to the end sought to be accomplished by those regulations, namely, the prevention of the loss of life and property, or injury thereto, caused by the improper dispensing, use and handling of gasoline, a highly flammable liquid. The question, then, as to whether the regulations in issue represent a constitutional exercise of the State's police power is not substantial.

Regarding the appellant's contention that he has been "singled out for enforcement

of Sections 16.74 and 16.75 F(1) of the Fire Prevention Code while other installations... were all permitted to operate...without any action being undertaken...against them" [J.S. at 7-8], it is not enough to show that a law or regulation has not been enforced against other persons. McKay Tel. & Cable Co. v. Little Rock, 250 U.S. 94, 39 S.Ct. 428, 63 L.Ed. 863 (1919).

> There must be something more, - something which in effect amounts to an intentional violation of the essential principle of practical uniformity. Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 38 S.Ct. 495, 62 L.Ed. 1154 at 1156 (1918).

See also, Oyler v. Boles, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962). But here, as the State Supreme Court has found [J.S. at 103-104], there was no such showing made:

> The record fails to support the charge of discriminatory classification and enforcement with respect to [appellant's] operations. The basis for distinguishing between [appellant's]

> self-service business and that of...convenience stores is evident - the latter maintains an attendant while the business is open to the public and according to the testimony of the Fire Marshal, the failure of this attendant to supervise the dispensing of gasoline would constitute a violation of the regulation. We fail to find evidence of discriminatory enforcement such as to deny [appellant] equal protection or due process of law. [J.S. at 103-104].

Actually, the appellant does not seriously challenge that conclusion. No substantial federal question is presented, therefore, as to an alleged discriminatory administration of the Fire Prevention Code provisions under attack.

Finally, the appellant maintains that the Occupational Safety and Health Act of 1970 [29 U.S.C. § 655] preempted Sections 16.74 and 16.75 F(1) when the Occupational Safety and Health Administration (OSHA) established jurisdiction over "self-service, unattended stations, while also specifically ruling that attendants are unnecessary for

safety." [J.S. at 9]. The purpose of the 1970 Act is, of course, to assure safe and healthful working conditions for working men and women [29 U.S.C. § 651; cf., Accu-Namics, Inc. v. Occupational Safety and Health Review Commission, 515 F.2d 823, rehearing denied, 521 F.2d 814 (5th Cir. 1975), certiorari denied, 425 U.S. 903, 96 S.Ct. 1492, 47 L.Ed.2d 752 (1976)], and not to provide safe and healthful purchasing conditions for retail customers and other members of the general public. We do not believe that Congress, when it enacted the Occupational Safety and Health Act of 1970, intended that the safety and health standards established by OSHA for employees and businesses engaged in inter-state commerce were to supplant regulations designed to protect persons other than employees. Nor do we believe that, on March 15, 1974, when OSHA deleted its requirement that each self-service gasoline station have

an attendant on duty, it intended to preclude an attendant's elective or state-mandated presence at such a station. At any rate, because there is no longer a federal law requiring an attendant at a self-service gasoline station, there can no longer be, as the State Supreme Court pointed out, a question of federal preemption of the field occupied by the challenged regulations. [J.S. at 104-105]. Furthermore, and again as the State Supreme Court noted, 29 U.S.C. § 667 provides:

> Nothing in [the Occupational Safety and Health Act] shall prevent any state agency... from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under Section 655 of this Title.

Even were we to concede, and we do not, that Sections 16.74 and 16.75 F(1) of the Fire Prevention Code constitute <u>occupational</u>

safety or health regulations, such would be permissible since there is no OSHA standard presently in effect regarding attendants at self-service gasoline stations. As before, the appellant has failed to present a substantial federal question.

CONCLUSION

It is respectfully submitted, therefore, that the appellant presents no substantial federal question for the decision of this Court and that, accordingly, this appeal should be dismissed.

Respectfully submitted,

DANIEL R. McLEOD
Attorney General

C. TOLBERT GOOLSBY, JR.
Deputy Attorney General

P. O. Box 11549
Columbia, S. C. 29211

(803) 758-3970 ATTORNEYS FOR APPELLEE.

CERTIFICATE OF SERVICE

I, C. Tolbert Goolsby, Jr., of counsel for Appellee Jesse C. Johnson, Fire Marshal of the State of South Carolina, and a member of the Bar of this Court, do hereby certify that in accordance with Rule 33, three (3) copies of the Appellee's Motion to Dismiss were served on Appellant on this date by depositing same in the United States mail, postage prepaid, and addressed as follows: Lee S. Alford, Esquire, Attorney at Law, Post Office Box 340, York, South Carolina, 29745; said address being within five hundred (500) miles from the point of mailing.

This 18th day of January, 1978.

C. Tolbert Goolsby, Jr.
Deputy Attorney General

Post Office Box 11549
Columbia, South Carolina 29211